

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

KYLE J. JOHNSON,)	
Petitioner,)	Civil Action No. 11-94 Erie
)	
v.)	District Judge Sean J. McLaughlin
)	Magistrate Judge Susan Paradise Baxter
SUPERINTENDENT COLEMAN, <u>et al.</u>,)	
Respondent.)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that Respondents' motion to dismiss [ECF No. 11] be dismissed as moot.

II. REPORT

Petitioner Kyle J. Johnson is a state prisoner currently incarcerated at the State Correctional Institution Fayette, located in LaBelle, Pennsylvania. In March of 2006, he was sentenced in the Court of Common Pleas of Erie County to a term of imprisonment of 12-24 years' incarceration for convictions entered at Criminal Docket No. CP-25-CR-3350-2005. Johnson has filed with this Court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, in which he challenges the state court's judgment against him.

Pending before the Court is Respondents' motion to dismiss [ECF No. 11]. They assert that Johnson's federal habeas petition should be dismissed as premature because he is exhausting his state-court remedies. Specifically, Respondents point out that, as of October of 2011, Johnson still was challenging the judgment entered against him by way of a petition for allowance of appeal, which he had

filed with the Pennsylvania Supreme Court. See Commonwealth v. Johnson, No. 530 WAL 2011 (Pa. Oct. 3, 2011).

The Pennsylvania Supreme Court's docket, of which this Court shall take judicial notice, establishes that on February 27, 2012, it issued an order in which it denied Johnson's petition for allowance of appeal. Accordingly, Respondents' motion should be dismissed as moot. By separate order, they will be directed to file an Answer to Johnson's petition, along with the complete state court record, including the Common Pleas Court's file, all transcripts, and appellate briefs.

III. CONCLUSION

For the foregoing reasons, it is respectfully recommended that Respondents' motion to dismiss [ECF No. 11] be dismissed as moot. Pursuant to the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.D.2 of the Local Civil Rules, Respondents may file objections in accordance with the schedule established in the docket entry reflecting the filing of this Report and Recommendation. Failure to do so will waive the right to appeal. Brightwell v. Lehman, 637 F.3d 187, 193 n.7 (3d Cir. 2011).

/s/ Susan Paradise Baxter
SUSAN PARADISE BAXTER
United States Magistrate Judge

Dated: March 5, 2012

cc: The Honorable Sean J. McLaughlin
United States District Judge